Office - Supreme Court, U. S.
FILED
APR 25 1942
CHARLES ELMORE CROPLEY
CLERK

(3)

Supreme Court of the United States

TERM, 1942

No. 10020 1179

COMMUNITY NATURAL GAS COMPANY,
Petitioner,

v.

RUTH RAVELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

J. HART WILLIS,
Dallas, Texas,
Counsel for Petitioner.

ED. H. SELECMAN,
THOMPSON, KNIGHT, HARRIS,
WRIGHT & WEISBERG,
Dallas, Texas,
Of Counsel.

HICKS PRINTING CO.—DALLAS

INDEX

Page

Petition for writ of certiorari

Statement of the case 2
Statement as to jurisdiction 9
Questions presented 9
Reasons relied on for allowance of writ 10
Prayer 11

Supporting brief

Opinions of the courts below 13
Jurisdiction 14
Statement of the case 14
Specifications of error 15
Argument 15
Conclusion 16

CASES CITED

Carey v. Pure Distributing Corp., 124 S. W. (2) 847, 133 Tex. 31 16

D. B. & N. O. Ry. Co. v. Barry, 98 Tex. 250 16

Franklin v. Houston Electric Co., 286 S. W. 578 16

Keaton on Negligence, Duty and Causation in Texas, 16 Texas Law Review 8 15

Missouri, Kansas, Texas Ry. Co. v. McLain, 105 S. W. (2) 206 16

Paris & G. N. Ry. Co. v. Stafford, 53 S. W. (2) 1019 16

Tompkins v. Erie, 304 U. S. 64, 82 L. Ed. 1188 ..... 9, 14

Supreme Court of the United States

TERM, 1942

No. 10020

COMMUNITY NATURAL GAS COMPANY,
Petitioner,

v.

RUTH RAVELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To The Honorable The Supreme Court of The United States:

Comes now Community Natural Gas Company, petitioner, and, applying for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully shows:

STATEMENT OF THE CASE

Ruth Ravell, a resident of Limestone County, Texas, an unmarried woman 43 years of age, brought this suit against Community Natural Gas Company, alleging that late in the fall of 1939 and up until February, 1940, Community Natural Gas Company operated and maintained a gas line in Navasota Street in Groesbeck adjacent to her home; that she occupied a bedroom facing on the street and that she kept her windows open; that defendant negligently allowed natural gas to escape from its line in Navasota Street, and was negligent in failing to discover and remedy the leaky condition of said line so that the gas permeated her home, causing her throat to become affected, giving her fever and sinking spells, and that about February 10, 1941, an agent of the defendant threw a lighted match into a water meter box in the street near plaintiff's home, causing an explosion and, plaintiff being in a highly nervous condition, the presence of the gas in her room and the explosion caused such a nervous upset of plaintiff that for a long period of time she was confined to a hospital, had medical, doctor, nursing and hospital bills to pay, and was totally incapacitated for a period of ten months. Plaintiff alleged that her eyesight and hearing were permanently impaired and thereby her earning capacity was diminished to the extent of $100.00 per month; that she had a life expectancy of 30 years; that she was engaged in writing insurance on a commission basis and made an average of $250.00 per month.

On the trial of the case plaintiff failed to prove any impairment of hearing or of eyesight, and the jury were instructed by the court that they could not consider these allegations in arriving at any damages for plaintiff.

Defendant answered categorically denying the allegations of plaintiff's petition and that defendant was negligent in any particular or that, if it was negligent, its negligence was a proximate cause of any injury sustained by plaintiff, and alleging that the result to plaintiff was unforeseeable. Defendant alleged that it exercised ordinary care in the maintenance of its gas system in Groesbeck and that, if plaintiff smelled gas and suffered any injuries therefrom, the gas she smelled emanated from the gas appliances in her home, there being some eight appliances in her seven-room home including the cook-stove and water heater, none of said appliances being vented or having any method of carrying the fumes out of the house; that she had continued to use said gas appliances of her own, which caused her injuries, if any. Defendant alleged that on discovering the leak in its main line the defendant within a reasonable time repaired same; that there had been no knowledge on the part of the defendant that it had a leak in its main line, plaintiff's complaints being always that the odors of gas were within her home. Defendant denied that there was any explosion save and except a slight flash of fire when an agent of the company, in order to find the leak, dropped a match in a water meter box closely adjacent to defendant's

main line in Navasota Street and some 40 feet from plaintiff's home, and that plaintiff was not present when said flash occured and suffered no injury therefrom.

On the trial of the case it was conclusively shown that natural gas has no toxic effect on the human body. That plaintiff was suffering from a streptococcic infection or other infection of the throat and a condition of flu, and that she had a disease known as manic-depressive psychosis. That on or about the 14th day of February her psychosis reached such a point that it was necessary to take her to a hospital in Marlin, from there to a sanitarium in Dallas, and finally to a psychopathic hospital in Galveston where she stayed approximately nine months. That after her return from the psychopathic hospital in Galveston she again engaged in the insurance business, writing insurance on a commission basis, and, while she had previously worked five or six days a week, for some time prior to and at the date of the trial she was working only two or three days a week. The testimony wholly failed to show, and plaintiff made no attempt to prove, what amount of money she had earned since returning from the hospital in Galveston, or what she was earning at the time of the trial, or what she probably would earn in the future.

At the conclusion of the testimony the defendant moved the court for an instructed verdict in its favor (Tr. 18 et seq.). The main grounds of the motion were:

(1)That the mental psychosis from which plaintiff suffered could not have been caused by natural gas, since gas in its natural state has no toxic effect on and does not affect any of the tissues, nerves or parts of the human body and that, if the failure to discover said leak was negligent, it could not have proximately caused any of the condtions complained of by plaintiff.

(2) That it was undisputed in the record that the gas appliances of plaintiff emanated fumes. That plaintiff had suffered no personal injury, except the mental injury or augmented mental condition caused by worry or apprehension, and that the stage reached by plaintiff on or about February 14th or 15th may have resulted from any one of a number of causes beyond the control of the defendant and with which defendant had no connection.

(3) That, defendant having no knowledge of plaintiff's mental condition, the result of her mental condition in that her psychosis developed to such a state as to require hospitalization could not be foreseen by a person of ordinary care, or of extraordinary care.

(4) That, even though gas escaped from defendant's line and may have come into plaintiff's room through windows, it commingled with gas from her own appliances and that, if her condition was the result of the commingling, same could not be segregated, and that the result of smelling gas or fear of gas odors which may have emanated partly from natural gas and partly from her own fixtures, would

not be sufficient to predicate liability against defendant. That no physical injury was proved, the facts conclusively showing that natural gas in such amounts as permeated plaintiff's home, if it did permeate same, could not have caused physical injury, and that plaintiff could not recover for fear or mental anguish, or any condition as the result of fear or mental anguish. That the equipment of defendant was that customarily used by the trade and the only available instrumentality of the kind in general and common use, and that the mere fact that by expansion and contraction a rubber gasket became worn and caused a slight leak would not be sufficient to constitute negligence of an actionable nature, or negligence which proximately caused or could have caused the mental condition complained of by plaintiff.

The court overruled defendant's motion for instructed verdict, stating that he would reconsider same in accordance with Rule 50 of Civil Procedure, to which defendant excepted; and proceeded to charge the jury (Tr. 351 et seq.).

The only ground of negligence submitted by the court was on the failure to discover and remedy the leak within a reasonable time, having instructed the jury that the equipment of defendant in Navasota Street was that ordinarily and properly used, stating that there were two controlling issues: (1) as to defendant's negligence; and (2) as to whether it was shown that gas escaped from the leak into the Ravell home, or was the proximate cause of the illness of plaintiff or the injuries as charged by her

(Tr. 354). The court also instructed the jury as a matter of law that the gas "that emenated therefrom is what is termed natural gas, 'sweet gas,' and that same within itself, as testified to and shown by the uncontroverted evidence in this case, has no injurious effect on the tissues of the body" (Tr. 356). The court then charged the jury that they could allow recovery to plaintiff for the doctors' bills as stipulated of $757.00, for her lost earning capacity during the ten months from the time she was taken to the hospital at Marlin on February 15, 1940, "and such further sum as you may find a fair compensation to plaintiff for the physical pain and suffering occasioned as result of her illness, in the event your verdict be in favor of plaintiff, and the lessening of the earning capacity of the plaintiff from the time she returned from the hospital to her home again, and up to the date of the trial, *and during the remainder of her life expectancy*, as you may find to be its value to be paid now, value of a sum of money to be paid at this time; and so state in your verdict" (Tr. 359).

The defendant excepted to the court's charge (Tr. 361) because it authorized a recovery for diminished earning capacity in the future when there was no proof to justify same, the evidence being wholly silent as to what she was making, and the only pleadings on diminished earning capacity being as to diminished hearing and eyesight, which had been withdrawn from the jury's consideration; also her own medical testimony that she was perfectly normal showed that she was normal at the time of the trial

in so far as her psychosis was concerned, and all of the other conditions of which she complained, pointing out that the court should have limited a recovery, if any, to the date of the trial or actual incapacity which was admitted in the record, and should not have authorized any recovery for physical pain and mental anguish in the future, or for diminished earning capacity in the future, there being absolutely no guide in the testimony for the jury's consideration.

The court overruled defendant's objection to the charge, the case was submitted to the jury, and a verdict of $10,000.00 in favor of plaintiff and against the defendant was returned into court, accepted and filed, and the court subsequently entered judgment on the jury's verdict for $10,000.00 (Tr. 363 et seq.); to all of which defendant excepted.

After the entry of the court's judgment the defendant again filed its motion for instructed verdict under Rule 50 and, in the alternative, its motion for new trial, assigning the various errors of the court (Tr. 365), the special charges requested by the defendant appearing at page 366 of the Transcript, said special charges having been asked and refused prior to the court's charge to the jury, all of said special charges appearing in defendant's alternative motion for new trial (Tr. 370 et seq.).

The court overruled for the second time defendant's motion for instructed verdict, and overruled defendant's motion for new trial (Tr. 374), to the action of the court in each instance the defendant excepting. Thereafter proper notice of appeal was given, bond

filed, and the case brought to the Circuit Court of Appeals on the complete record. The judgment of the District Court was affirmed by the Circuit Court of Appeals on February 18, 1942, opinion by Mr. Justice Foster (opinion, Tr. 386; Circuit Court of Appeals judgment, Tr. 389). A motion for rehearing was duly filed, which was by the Circuit Court of Appeals overruled on March 24, 1942, without written opinion (Tr. 403).

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon the Supreme Court by Section 240, Judicial Code, 28 U.S.C.A. 347.

QUESTIONS PRESENTED

The Circuit Court of Appeals erred in failing to follow the Texas law in the particulars hereinafter set out. Since the case of *Tompkins* v. *Erie* in the Supreme Court of the United States, and the many cases following same in this court, it is mandatory in the federal courts to follow the law as laid down by the courts of the respective states.

I

The Circuit Court erred in holding, referring to the acts of negligence, that it was a question for the jury "if the leak in the pipe line and the explosion were not the proximate cause, whether they were a contributing cause of plaintiff's injuries" (court's opinion, Tr. 388). Under the laws of Texas, even though negligence of a defendant might be a contri-

buting cause of the injuries, it is not sufficient for recovery. The negligence must be a proximate cause of the injuries. It is settled in Texas that for a defendant to be liable it is necessary that the negligence be a proximate cause. If the negligence is not a proximate cause, defendant is not liable even though its negligence is a contributing cause.

II

The Circuit Court of Appeals erred in holding (page 3 of its opinion, Tr. 388) "that the result of the gas leaking and the explosion could not be foreseen would not prevent recovery." There can be no recovery for negligence in Texas unless the result, or some like result, could have been foreseen by the defendant.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

The opinion of the Honorable Circuit Court of Appeals has decided an important question of local law in a way in conflict with all applicable local decisions. Texas has held since the earliest adjudicated cases (1) that before damages may be recovered against a defendant the acts of negligence relied upon must be a proximate cause of the injuries; (2) that there can be no recovery for negligence in Texas unless the result, or some like result, could have been foreseen by the defendant.

II

The Circuit Court of Appeals has not given proper effect to applicable decisions of this court in that the Supreme Court has held that the law of the state where the suit is tried must govern the rights of the parties.

III

The Circuit Court of Appeals has so far departed from the accepted and usual course of judical proceedings and has so far sanctioned such a departure by the trial court, as to call for exercise of this court's power of supervision.

IV

Since the inion and judgment of the Circuit Court of Appeals did not consider the law of the State of Texas but decided contrary thereto, it has created confusion as to what the law is in Texas applicable to suits for negligence, which in the interest of the public should be settled by the Supreme Court.

WHEREFORE petitioner prays that a writ of certiorari issue to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, commanding it to certify to the Supreme Court, for its review and determination, on a day certain, a full and complete transcript of the record and proceedings in cause numbered and entitled on the docket No. 10020, Community Natural Gas Company v. Ruth Ravell, and that the judgment of the Circuit Court of Appeals and the District Court be reversed; and that petitioner

have such other and further relief in the premises as this court may deem proper.

Respectfully submitted,

J. HART WILLIS,
Dallas, Texas,
Counsel for Petitioner.

ED. H. SELECMAN,
THOMPSON, KNIGHT, HARRIS,
WRIGHT & WEISBERG,
Dallas, Texas,
Of Counsel.

Supreme Court of the United States

TERM, 1942

No. 10020

COMMUNITY NATURAL GAS COMPANY,
Petitioner,

v.

RUTH RAVELL,
Respondent.

SUPPORTING BRIEF

To The Honorable The Supreme Court of The United States:

I

OPINIONS OF THE COURTS BELOW

The opinion of the District Court appears in the record, pages 363 to 365. The opinion of the Circuit Court of Appeals appears in the record on pages 386 to 388, and is reported in 125 Federal (2nd) at page 913.

II

JURISDICTION

The opinion of the Circuit Court of Appeals was handed down on February 18, 1942, and the motion for rehearing was overruled March 24, 1942.

Jurisdiction is conferred on the Supreme Court by Section 240, Judicial Code, 28 U.S.C.A. 347.

Jurisdiction is invoked on the grounds:

The Circuit Court of Appeals failed to follow the Texas law:

(a) In holding that, even though the negligence relied on was not a proximate cause, recovery could be had if it were a contributing cause of plaintiff's injuries.

(b) In holding that the result of the gas leaking and explosion could not be foreseen would not prevent recovery.

(c) In failing to follow the holdings of the Supreme Court of the United States, as set forth in *Tompkins* v. *Erie* and other cases, that the federal court must give effect to the law as laid down by the courts of the respective states.

III

STATEMENT OF THE CASE

The facts set forth in the statement contained in the petition are sufficient for the purposes of the brief and in the interest of brevity are not repeated here

but are specifically referred to and made a part hereof as though set out in full.

IV

SPECIFICATIONS OF ERROR

The specifications of error for the purposes of this brief and in the interest of brevity, are found under the subdivision "Questions Presented" of the petition and in the statement above herein entitled "Jurisdiction is invoked on the grounds: (a), (b) and (c)," which are that the Circuit Court of Appeals ignored the law in Texas with reference to foreseeability and proximate cause, and held that neither was necessary for a recovery in an action for negligence, which is contrary to all adjudicated cases in Texas.

ARGUMENT

It is well settled in Texas that for a defendant to be liable for injuries it is necessary that the negligence of defendant be a proximate cause. If the negligence is not a proximate cause, defendant is not liable even though the negligence is a contributing cause. This rule is well stated by *Keaton* in his article, "Negligence, Duty and Causation in Texas," volume 16, Texas Law Review, page 8:

> "Rules or principles of legal cause are devised in order to prevent the defendant from being liable for consequences which his negligence was an actual cause in producing."

The rule is succinctly stated in the following cases:

D. B. & N. O. Ry. Co. v. Barry, 98 Texas 250;

Franklin v. Houston Electric Co., 286 S. W. 578;

Paris & G. N. Ry. Co. v. Stafford, 53 S. W. (2) 1019;

Missouri, Kansas, Texas Ry. Co. v. McLain, 105 S. W. (2) 206;

Carey v. Pure Distributing Corp., 124 S. W. (2) 847, 133 Tex. 31.

The Circuit Court of Appeals erred in holding "that the result of the gas leaking and the explosion could not be foreseen would not prevent recovery." This is contrary to all the negligence cases in Texas for the reason that the Texas law is that before recovery may be had for negligence, the result, or some like result, must have been foreseen by the defendant. The following Texas cases show conclusively that this is the law in Texas:

Missouri, Kansas, Texas Ry. Co. v. McLain, 105 S. W. (2) 206;

Paris & G. N. Ry. Co. v. Stafford, 53 S. W. (2) 1019;

Carey v. Pure Distributing Corp., 124 S. W. (2) 847, 133 Tex. 31.

CONCLUSION

Although this is a controversy between private parties, yet it does involve a very important question and one that is of utmost importance to the judiciary

of the State of Texas and the settling of a conflict between the Texas decisions and the decision of the Fifth Circuit Court of Appeals in the instant case as to the law in Texas, and therefore in our opinion this controversy should be settled by the Supreme Court, by reason of its public interest and the uncertainty that now exists.

Respectfully submitted,

J. HART WILLIS,
Dallas, Texas,
Counsel for Petitioner.

ED. H. SELECMAN,
THOMPSON, KNIGHT, HARRIS,
WRIGHT & WEISBERG,
Dallas, Texas,
Of Counsel.